

Before the Complaints Assessment Committee

Complaint No: C22210

In the matter of **Part 4 of the Real Estate Agents Act 2008**
and

Licensee 1: **Phillip Haydock (10054187)**

Licensee 2: **(John) Alan Haydock (10012965)**

Licensee 3: **Tony (Michael) Bayley (10016216)**

Decision of Complaints Assessment Committee

**Decision finding of unsatisfactory conduct (asking for submissions on
orders)**

9 July 2019

Members of Complaints Assessment Committee: CAC519

Chairperson: Jane Ross

Deputy Chairperson: Rachel Palu

Complaints Assessment Committee

Decision finding unsatisfactory conduct including orders

1. The Complaint

- 1.1. On 4 September 2018 the Real Estate Agents Authority (the Authority) received a complaint against Phillip Haydock (Licensee 1), (John) Alan Haydock (Licensee 2) and Tony (Michael) Bayley (Licensee 3) from the Complainant.
- 1.2. Licensees 1 and 2 (the Licensees) are licensed Salespersons under the Real Estate Agents Act 2008 (the Act) and at the time of conduct complained of were engaged by Bayleys Real Estate Limited t/a Bayleys Real Estate (the Agency) and were joint listing licensees. Licensee 3 is a licensed Agent and is the supervising agent of Licensees 1 and 2.
- 1.3. The complaint relates to a commercial leasehold property (the Property). Prior to August 2017, the Property was owned by Company A, as Trustee of Trust A (the Trust). The Complainant is the sole director and shareholder of WGI. After a marketing and tender process carried out by Licensees 1 and 2, the Complainant entered into an unconditional agreement for sale and purchase with Company B. Two weeks later, Company B nominated Company C, the owner of the underlying freehold land and lessor of the ground lease, as purchaser of the Property.
- 1.4. On 7 November 2018 Complaints Assessment Committee 519 considered the complaint and decided to inquire into it under section 79(2)(e) of the Act.
- 1.5. On 25 March 2019 the complaint was transferred to Complaints Assessment Committee 1902 (the Committee) and on 27 March 2019 the Committee considered the complaint and decided to enquire into it under section 79(2)(e) of the Act.
- 1.6. The details of the complaint are that in selling the Property Licensees 1 and 2 knew Company B acted on behalf of Company C and failed to provide that information to the Complainant, or provided misleading information to conceal Company C's interest, and failed to act in the Trust's best interest. The Complainant alleges that Licensee 3 failed to adequately or fairly deal with, or investigate, the Complainant's concerns against Licensees 1 and 2 and withheld information requested by the Complainant.
- 1.7. In particular, the Complainant claims:
 - a) That Licensees 1 and 2 knew that Company B was a warehousing agent for Company C, and misled the Complainant about the identity of the purchaser or failed to disclose this in a timely manner.
 - b) That Licensees 1 and 2 facilitated the warehousing arrangement to enable Company C to purchase the Property for a sum substantially lower than the Complainant would have accepted had she known Company C was the purchaser, and substantially lower than what the Licensees knew the Property to be worth to Company C as the landlord.
 - c) The arrangement was likely to provide benefits downstream to Licensees 1 and 2 in their ongoing business dealings with Company C.
 - d) During marketing, Licensee 1 talked directly to Company C, about the next ground rent review without reference to the Complainant and without her permission or authority.
 - e) After an agreement for sale and purchase (ASP) for the Property was entered into,

Licensees 1, 2, and 3 withheld the identity of the payee of the deposit, being Company C, and Licensee 3 failed to provide the statement of account required under s 124 of the Act which was requested on multiple occasions by the Complainant.

- f) A GST invoice for the commission was not provided until January 2018 despite requests by the Complainant from August 2017.
 - g) A marketing GST credit of \$224.65 was not given to the Complainant as agreed.
 - h) The Complainant has suffered losses totaling \$551,431.55, which comprise a loss in sale price of \$465,000.00, payment of commission of \$49,272.38, legal fees incurred of \$18,659.36, and \$18,000.00 for personal costs and time seeking information, explanations and investigating the matter and preparing her REA complaint.
- 1.8. The remedy sought by the Complainant is that the events of the complaint be made public so as to expose how the Agency operates. The Complainant also considers that failures by the Licensees to provide documents requested should be escalated to the Real Estate Agents Disciplinary Tribunal (the Tribunal). Despite the losses referred to by the Complainant, she does not seek compensation through the complaint process.
- 1.9. The Licensees responded to the complaint against them. In particular, the Licensees commented that:
- a) Licensees 1 and 2 do not accept that they misled the Complainant about the identity of the ultimate purchaser (Company C) or breached their fiduciary duty to the Complainant.
 - b) Whilst Licensee 2 was aware that Mr A of Company B had acted for other purchasers in the past, Licensees 1 and 2 were not aware that Company B or Mr A were acting for Company C or that they intended to nominate Company C as purchaser.
 - c) The Agency has worked with Company C in the past, which is reasonable given the Agency's presence in the commercial property market. However, Licensees 1 and 2 refute that they colluded with Company C as suggested by the Complainant. They also did not receive any benefit or kickback (financial or otherwise) from Company C in relation to the sale.
 - d) Licensees 1 and 2 acted in the Complainant's best interests and achieved an excellent sales price through a comprehensive marketing campaign.
 - e) Licensee 3 conducted a thorough and fair investigation into the Complainant's complaint concerning Licensees 1 and 2 and acted appropriately in the circumstances.
 - f) Licensee 3 did not supply misleading information concerning the confidentiality agreement supplied to Company B.
 - g) Prior to payment of the deposit, the Agency was not aware that Company C was the intended ultimate purchaser. The Agency also had no obligation to advise the identity of the person who paid the deposit.
 - h) Licensee 3 provided the Complainant with a screenshot of the trust account ledger on 23 August 2017.
 - i) As the Agency had agreed to hold the commission in its trust account, the GST invoice for the commission was not available until the commission was paid. The reduction in marketing costs was taken into account when calculating the commission and did not

require a credit note.

1.10 Relevant agreed facts

- a) On 15 June 2017 the Complainant entered into a Commercial and Industrial Agency agreement with the Agency, which provided for a 90-day sole agency, under which Licensees 1 and 2 were to jointly act as the Trust's agents.
- b) The Property was to be sold by Tender (closing on 1 August 2017) following a four-week marketing process.
- c) Licensee 1 suggested that the Complainant pre-sign an agreed confidentiality agreement to speed up the release of confidential information to interested parties.
- d) Licensees 1 and 2 provided the Complainant, in person or by email, with four, weekly marketing reports.
- e) An unconditional ASP was entered into between the Complainant and named purchaser, Company B or Nominee, on 4 August 2017.
- f) The deposit due on 4 August 2017 was received into the Agency's trust account on 7 August 2017.
- g) The deposit was paid by Company C.
- h) Company B nominated Company C as the purchaser on 17 August 2017.

1.11 Relevant disputed facts

- a) Prior to the Complainant entering into the ASP, Licensees 1 and 2 were aware of Company C's interest as ultimate purchaser and aware that Mr A, or Company B, was being used as a front to facilitate Company C's purchase.
- b) Licensees 1 and 2 provided misleading information around Company C's purchase and deliberately concealed information from the Complainant.
- c) Licensees 1 and 2 were aware that there was a material difference to the Complainant in the value of the Property if Company C was the purchaser.
- d) The Licensees were aware that the Complainant required information about the identity of the payee of the deposit at the time of payment, and deliberately withheld or concealed this information.

2. What we decided

- 2.1. On 31 May 2019 the Committee held a hearing on the papers and considered all the information that had been gathered during the inquiry.
- 2.2. The Committee found that Licensees 1, 2 and 3 have engaged in unsatisfactory conduct under section 89(2)(b) of the Act in relation to some of the aspects of the complaint. The decision was made with reference to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (rules).

3. Our reasons for the decision

- 3.1. The Committee found, pursuant to section 72 of the Act, that Licensee 1, 2 and 3's actions fall short of the standard that a reasonable member of the public is entitled to expect from a

reasonably competent licensee, and contravene rules made under the Act.

The Committee concluded that:

- 3.2. It is not proved that before the ASP was signed Licensees 1 and 2 knew that Mr A or Company B were potentially acting for Company C, or that Company C was intended to be the ultimate purchaser.
- 3.3. It is not established that Licensee 1's discussions with Company C about ground rent were inappropriate or that Licensee 1 and 2's views concerning the upcoming ground rent review were used to promote Company C's interests over those of the Trust.
- 3.4. In dealing with Company C and Company B, Licensees 1 and 2 failed to adequately manage and report on information concerning the distribution and release of the confidentiality agreement and the Complainant's commercially sensitive and confidential information. Rules 5.1, 6.1 and 9.3
- 3.5. It is not established that after the Property was listed with the Agency, Licensees 1 and 2 were required to disclose the identity of a party who showed interest in the Property prior to that listing.
- 3.6. Licensees 1 and 2 failed to report on Mr A's/Company B's interest in the Property to the Complainant in a timely manner. Rules 5.1 and 9.3
- 3.7. It is not established that Licensee 2 had an obligation to ask Mr A who he was acting for.
- 3.8. Licensees 1 and 2 allowed the release of confidential information to Mr A without a vendor signed confidentiality agreement, or prior approval from the Complainant. Rules 5.1 and 6.1
- 3.9. It is not established that Licensees 1 and 2 were required, or instructed, to treat Company C differently from other potential purchasers, or that Company C would have paid more money or a premium for the Property if the Complainant had been aware of Company C's involvement or interest.
- 3.10. Licensee 1 failed to act in the Trust's best interests when providing information confirming payment of the deposit on 4 August 2017. Rules 6.1, 6.2 and 6.4.
- 3.11. Licensee 1 failed to ensure that the email of 4 August 2017 confirming payment of the deposit in accordance with the ASP was placed on the transaction file. Rule 5.1
- 3.12. It is not established that the Licensees were required to advise the Complainant of the identity of the payer of the deposit.
- 3.13. It is not proven that information provided by the Licensees to the Complainant about prospective purchaser Purchaser A was misleading.
- 3.14. Licensees 1 and 2 failed to ensure the full credit of \$2,378.90 plus GST represented in Licensee 1's email of 16 June 2017 was deducted from the commission. Rules 5.1 and 6.4.
- 3.15. As the commission was to be held in the Agency's trust account at the Complainant's request, there was no breach associated with the timing of when the Agency's GST invoice for commission was raised.
- 3.16. It is not proven that commission was deducted from the deposit held by the Agency for the Property in conflict with the Complainant's instructions.

- 3.17. Licensee 3 failed to conduct a thorough and adequate investigation in relation to documentation concerning payment of the deposit and in doing so failed to keep the Complainant well informed of matters relevant to her interests. Rules 6.2 and 9.3.
- 3.18. Licensee 3 failed to facilitate information from the Agency to provide a full account of money received in respect of the transactions for the Property as required under s 124 of the Act. Rules 6.4 and 9.3

Licensees 1 and 2

Identity of the ultimate purchaser

- 3.19. Rule 5.1 sets out the basic level of competence required of licensees and provides that a licensee must exercise skill, care, competence and diligence at all times when carrying out real estate agent work. Under Rule 6.1 a licensee must comply with fiduciary obligations to the licensee's client. Rule 6.2 provides that a licensee must act in good faith and deal fairly with all parties engaged in a transaction. Under Rule 6.4 a licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client. Under Rule 9.3 a licensee must communicate regularly and in a timely manner and keep the client well informed of matters relevant to the client's interest, unless otherwise instructed by the client.
- 3.20. The Complainant claims that Licensees 1 and 2 knew of the warehousing nature of Company B's involvement in the transactions for the Property and the true identity of the ultimate purchaser, and that they failed to disclose this to her in a timely manner. In particular the Complainant claims that Licensees 1 and 2 failed to advise of, or draw her attention to, the fact that a Company C representative had signed a confidentiality agreement on 17 July 2017; that Licensee 1 discussed ground rent with the Company C representative without her permission; that it was likely that Mr A of Company B was acting for an undisclosed purchaser; that Purchaser A, who was not suitably interested, had been encouraged by Licensee 1 and 2 to participate to deflect Company C's interest; and that after the ASP was entered into, Licensee 1, 2, and 3 withheld the identity of the payee of the deposit, Company C, until it was too late for the Complainant to cancel the agreement.
- 3.21. Whilst, there are some anomalies in relation to the provision of information by the Licensees (which are discussed below) it is not possible to find on the evidence that Licensees 1 and 2 knew about Company C's interest prior to acceptance by the Trust of Company B's offer, or of the warehousing nature of the transaction, or that the Licensees conspired with Company B or Company C to facilitate a warehousing arrangement. Licensees 1, 2 and 3 dispute that they knew that Company C was involved until the deposit was paid or the Complainant raised her complaint. Mr A has also said that he did not tell the Agency that he was acting for Company C. The information relied on by the Complainant in support of this claim is discussed in greater detail under the headings below.
- 3.22. The Committee takes no further action in respect of this aspect of the complaint.

Ground rent

- 3.23. The Complainant claims that Licensee 1's discussion with Company C about ground rent - which she did not authorise - demonstrates the closeness between the Agency and Company C. The Complainant also considers that the information that the ground rent for the Property was likely to increase 300% at the next rent review (due in January 2018) was unsubstantiated, not supported by other rent reviews in the area and relied on market gossip, and Licensee 1 should have referred to reliable verifiable market data in this respect. The Complainant considered

that the information was in effect propaganda issued to promote Company C's objective of driving prices down in conflict with the Trust's interests. As such the Complainant contends that Licensees 1 and 2 failed to act in the Trust's best interests.

- 3.24. After reviewing the information concerning Licensee 1's discussions with Mr B, for Company C, concerning ground rent, the Committee is not satisfied that the discussion was inappropriate. Licensee 1 states that he had considered Company C to be a potential purchaser and contacted Mr B (for Company C) who inspected the Property. During the inspection the topic of ground rent was discussed.
- 3.25. The Complainant submits that Licensee 1's view that ground rent was likely to increase substantially at the next review caused her to believe that Licensees 1 and 2 were not promoting her best interests and she lost confidence in their service. The Complainant says this became a distraction and she did not read the week 3 report (which first mentioned Mr B's inspection and Company C's potential interest) or participate as she would normally with the feedback from the report.
- 3.26. However, it is not possible to find that Licensees 1 or 2 used or referred to potential ground rent increases to put off other buyers or enhance Company C's position. The weekly reports for weeks 2 and 3 report some similar buyer feedback. The week 2 report summarises discussion at an inspection with prospective purchaser Purchaser B on 14 July 2017 and notes that a valuer friend of Purchaser B considered that the ground rent may increase by three times. The executive summary for the week 3 report advises that despite the ground rent review being a market review, parties appeared to be taking a common approach of calculating a fixed percentage of 6.5% of land value to estimate future ground rent. The summary goes on to include calculations associated with that analysis which show ground rent increases of between 85% and 317% depending on the land value. The Committee accepts that the information contained in the week 3 and 4 reports was received by the Complainant when they were sent to her, despite the fact that she did not read the reports.
- 3.27. The Committee takes no further action in respect of this aspect of the complaint.

Company C's Confidentiality agreement

- 3.28. In terms of misleading conduct, the Complainant claims that Licensees 1 and 2 did not disclose that a Company C representative (Mr B) had signed a confidentiality agreement. The Complainant considers that given the significance of dealing with the Trust's landlord, the provision of this information should have been separately mentioned.
- 3.29. The Committee is satisfied that Mr B's confidentiality agreement was created after 4.00pm on 17 July 2017 (which was after Licensee 1 met with the Complainant at 11.30am on 17 July 2017) and was signed on 17 July 2017 by Mr B for Company D. Further, Licensee 1 confirms that he understood Mr B acted for Company C and that this was recorded in the marketing reports for weeks 3 and 4.
- 3.30. The report for week 3, dated 26 July 2017, advises that information was sent to Mr B on 17 July and that he had inspected the Property on 18 July. (Whilst 17 July is the date of the week 2 report, that report reported on activity up to 14 July.) Licensee 1 states that the Licensees did not specifically advise the Complainant every time they sent or received a confidentiality agreement and didn't believe the Complainant expected them to. It was also submitted for the Licensees that the signing of a confidentiality agreement was implicit in the report for week 4, dated 31 July 2017, which advises that tender documents and information were sent to Mr B on 25 July 2017, which could only have occurred with a signed confidentiality agreement.

- 3.31. However, the Committee considers that rules 5.1, 6.1 and 9.3 required timely and clear reporting to the Complainant (which was not provided in relation to Company C's or Company B's involvement as discussed below), particularly so where the Licensee was holding a confidentiality agreement which had been pre-signed by the Complainant; the information that was being released under it was commercially sensitive; and the reports furnished by Licensees 1 and 2 were said to have been "detailed" and "very comprehensive". The pre-signed confidentiality agreement was also held in trust by Licensees 1 and 2 and the Committee considers that Licensees 1 and 2 were required to report to the Complainant when each agreement was released, advise to whom, and to keep track of these details and how they were released.
- 3.32. The week 3 report provides that "information was sent through" to Mr B on 17 July 2017. The week 4 report provides that tender documents were sent to Mr B on 25 July 2017. The report does not refer to any other documents provided to Mr B. It is therefore not implicit from the week 4 report or other information reported concerning Mr B that he signed a confidentiality agreement or received confidential information. The Executive Summaries in the week 2 and 3 reports confirm that the Agency did not finalise the tender conditions of sale until the time of the week 3 report (25 July 2017). The week 3 report also records tender documents first being distributed to all parties who had shown some interest on 25 July 2017. It does not follow that tender documentation was only released to parties who had signed a confidentiality agreement. The weekly reports referred to the 'confidential agreement and documents' and 'tender documents' separately. The week 4 report records Mr C, Mr D and Ms A as receiving tender document, but does not record those parties completing a confidentiality agreement. It is therefore clear that a confidentiality agreement was not required for the release of tender documents.
- 3.33. In addition, the weekly marketing reports advised in a timely and clear manner when other interested parties had signed a confidentiality agreement and received confidential information. As completion of a confidentiality agreement entitled Mr B, a party who represented the Trust's landlord, to the Trust's confidential lease and expense information, the Committee considers that the obligation to report on the distribution of confidential information to Company C was greater than for other prospective purchasers.
- 3.34. The Committee finds Licensees 1 and 2 in breach of rules 5.1, 6.1 and 9.3 in respect of the distribution and release of the confidentiality agreement and the Complainant's commercially sensitive and confidential information.

Early interested party

- 3.35. When the Complainant was first referred to the Agency, and before she listed the Property with the Agency, Licensee 1 advised the Complainant that the Licensees had a potential interested buyer for the Property. The Complainant considers that once she engaged the Agency and the Property was on the open market, Licensee 1 should have disclosed the identity of the interested party to her. The Complainant also believes that the interested party was either Company B or Company C. Licensee 1 and 2 state that the party was not Company B or Company C. Regardless, the Committee is not satisfied that there was an obligation on Licensee 1 or 2 to disclose the identity of a party who showed interest in the Property prior to an agency agreement being signed.
- 3.36. The Committee takes no further action in respect of this aspect of the complaint.

Mr A / Company B

Information reported or provided

- 3.37. The Complainant claims that Licensee 1 provided misleading information to her about Mr A/Company B. She says that Licensee 1 held out Mr A as being an investor and didn't disclose that he was really a developer (which did not fit the profile of her intended purchaser as the Property had zero development potential). The Complainant also says that Licensee 1 backdated entries in relation to Mr A/Company B in the week 4 marketing report.
- 3.38. It is not possible to find that the entries concerning the timing of Mr A's involvement were back dated or fictitious to make his interest appear more credible. The week 4 report records that Mr A was a known investor who was sent an information pack on 21 July 2017, and signed a confidentiality agreement and received tender documents on 24 July 2017. This information could have been included in the week 3 report which reported activity up to and including 25 July. In responding to the delay concerning the entry of Mr A's interest or participation, Licensee 1 states that this was due to Mr A being a client of Licensee 2 and he was not aware of steps taken by Licensee 2 when he prepared the week 3 report.
- 3.39. However, the Committee considers that rules 5.1 and 9.3 required Licensees 1 and 2 to liaise with each other to ensure that current information was being shared and reported. Three other parties who are also referred to as "known investors" and who were sent information packs on 21 July or earlier, featured in the report published immediately following contact with them. As there were only four reports, of which the first two dealt with advertising and preliminary interest; there was a five day lapse between Mr A's first involvement (21 July 2017) and the date of the week 3 report (26 July); confidential information was released to Company B on 24 July; and the week 4 report was dated the day before the tender closed; the Committee is satisfied that timely reporting required Mr A's interest to have been reported in Week 3. The late report in week 4 therefore amounts to a breach (albeit minor) of rules 5.1 and 9.3
- 3.40. The Complainant claims that Licensee 2 was required to ask Mr A who he was acting for, given Licensee 2's knowledge that Mr A acted for others. However, the Committee is not satisfied that there was an obligation to make further enquires of a potential nominator in a commercial transaction. In addition, and whilst it is understood that the Complainant assumed that any nominee would be a Intergroup A nomination (aligned to the Company B Group), the Complainant did not object to inclusion of a nominee once she was satisfied that there would be no adverse GST impact.
- 3.41. The Committee takes no further action in respect of this aspect of the complaint.

Confidentiality agreement

- 3.42. The Complainant refers to the provision of an unsigned confidentiality agreement to Mr A and inconsistencies in the information surrounding the dispatch and receipt of the agreement. The Complainant contends that this confidentiality agreement was provided in haste to make it look like Mr A had inquired about the Property for himself. The Complainant considers that the agreement was likely to have been emailed or faxed by licensee Mr E at the Agency to Mr A or those acting for him and, once signed, emailed to the Agency by Company C's solicitors. In support the Complainant refers to the document properties of the confidentiality agreement and the Deed of Nomination which, unlike other Agency documents, came from a Ricoh copier. The Complainant also considers that the handwriting in the confidentiality agreement and Company B's tender documents is that of Ms B, Company C's lawyer. The Complainant claims that this is supported by Mr A's silence on pertinent questions asked of him, and the lack of documentation establishing what documents were received by Mr A.
- 3.43. Licensees 1 and 2 are unable to recall when and how Mr A obtained a copy of an unsigned confidentiality agreement, or provided a signed copy to the Agency. Licensee 3's evidence of

23 August 2017 states that the signed confidentiality agreement was delivered to the Agency by Company B and it is believed that at the same time a property information pack and tender documents for the Property were picked up. Licensee 3's evidence also says that the Licensees were unable to confirm where Company B had obtained a copy of the confidentiality agreement from and the Agency did not have any record of sending it to Mr A for Company B.

- 3.44. Despite the provision of the full transaction file in response to requests by both the Complainant and her solicitors, and the Committee, an original signed copy of the confidentiality agreement to and from Mr A has not been provided. However, on the information provided it is not possible to find the motive behind putting together the agreement as claimed by the Complainant. It is also not possible to find that Company B's confidentiality agreement or tender was put together by Company C's solicitors. Further, the Committee does not accept the Complainant's assertion that silence by the Agency in this respect equates to assent.
- 3.45. However, the information does confirm that as Company B's confidentiality agreement was not signed by the Complainant, as it was for all other parties, the Complainant had not confirmed her agreement to release confidential information to Company B. The Committee understands from the Complainant's evidence that the only other confidentiality agreement which was not pre-signed, being the one concerning prospective purchaser Purchaser C, was separately signed by the Complainant. The Committee is satisfied that confirmation of the Complainant's agreement was required under rules 5.1 and 6.1 before confidential information was released. It is clear from the information provided by Licensee 3 that this did not occur with the release of information to Mr A/Company B. The Committee therefore finds that Licensees 1 and 2 breached rules 5.1 and 6.1 in this regard.
- 3.46. As already stated above, the Committee is satisfied that under rules 5.1 and 6.1 Licensees 1 and 2 were also required to keep track of to whom and how confidentiality agreements were distributed, and how they were handled. As the Licensees cannot say how Company B obtained or returned a copy of the confidentiality agreement, the Committee finds that Licensees 1 and 2 breached rules 5.1 and 6.1 in this respect.

Company C to be treated differently

- 3.47. The Complaint considers that Licensees 1 and 2 would have well understood that the value to her of the Property would have been significantly higher if her landlord, Company C, was interested in purchasing the Property. The Complainant says that the Agency's value range for the Property was based on a third party purchaser paying ground rent, but considered that Company C (as owner of the underlying freehold land and lessor of the ground lease) would have paid more because the ground rent was neutral to Company C. The Complainant says that she had a registered valuation \$250,000.00 higher than the upper end of the price estimate in her agency agreement with the Agency. The Complainant says she agreed with the registered valuation figure despite concerns with the content of the valuation and the market data used. As already referred to, the Complainant claims that Licensees 1 and 2 withheld information about the true identity of the purchaser and that information was critical to her decision to sell at the price offered. The Complainant claims that she was instructed by Licensee 1 to accept a price lower than she wanted and that had she known the purchaser was Company C she would have been firmer on price.
- 3.48. However, it is not possible to find that Licensees 1 and 2 knew about Company C's involvement prior to 7 August 2017. The Committee is also not satisfied that Licensees 1 and 2 should have known Company C was to be treated differently to any other prospective purchaser. The Complainant did not specifically instruct this and has also acknowledged that she did not

request information about interest from her landlord because she did not see this as necessary and thought Company C was probably not interested. It also does not necessarily follow that Company C would have paid more money for the Property. Whilst Company C as a purchaser may not have paid ground rent to itself, this benefit would have been offset by the loss of the income from payment of the ground rent on sale. Further, it is not established that Company C had other development prospects which required the Property's car parks or for which it would have paid a premium for the Property.

- 3.49. The Committee takes no further action in respect of this aspect of the complaint.

Information concerning payment of the deposit

- 3.50. During the afternoon of 4 August 2017, Company B's offer was accepted by the Trust and the ASP became unconditional. At this point the 10% deposit, as required by the ASP, became immediately payable. Due to the timing of the ASP signing, Licensee 1 sent out payment details to the purchaser late in the afternoon of Friday 4 August 2017. The Complainant was anxious about the purchaser's cash flow and emailed Licensee 1 with several requests for him to obtain confirmation from the purchaser that the deposit had been paid that day. Given the time of day the Complainant accepted that the deposit was unlikely to clear until the following week, but confirmed her need for confirmation of payment that day with Licensee 1. The Complainant kept in contact with Licensee 1 by text through the evening of 4 August 2017 and at 9.46pm that evening Licensee 1 sent a text to the Complainant advising that he had just received the email confirming payment of the deposit for the Property.
- 3.51. After becoming aware of Company C's nomination, the Complainant asked Licensee 1 for various information in respect of the transactions for the Property, including a copy of the email Licensee 1 received on 4 August 2017 confirming payment of the deposit. In his response to the Complainant on 21 August 2017, Licensee 1 advised that correspondence between the Agency and the purchaser was confidential and the Agency did not have the purchaser's authority to provide it. This response was unsatisfactory to the Complainant as Licensees 1 and 2 acted for her and not the purchaser.
- 3.52. The Committee is satisfied that the email confirming payment of the deposit was not confidential to the purchaser as claimed. In the circumstances where Licensee 1 was acting as the Trust's agent to obtain confirmation of an obligation due under the ASP, an email confirming satisfaction of the obligation also belonged to the Trust. The Committee therefore finds that Licensee 1's response favoured the purchaser's interests over the Trust's and as such breached rules 6.1, 6.2 and 6.4.
- 3.53. In addition, in August 2017 both the Complainant and her solicitors requested a complete copy of the Agency's file for the Property. In response Licensee 3 provided a file which he said was the entire transaction file. In subsequent correspondence Licensee 3 reiterated that the full file had been provided and included all relevant correspondence between Licensees 1 and 2, and Company B and Mr A. Licensee 3's responses did not advise that confidential information had been withheld. Despite this the file did not include a copy of the 4 August 2017 confirmation of payment of deposit email. The Committee also requested a copy of the Agency's full property file for the Property with a further specific request for a copy of the 4 August 2017 confirmation email. The Agency's solicitor confirmed that the full file had been provided and Licensee 1 advised through his office that he did not have a copy of the email, he had no explanation why he didn't have a copy other than that he deals with numerous emails, and it did not seem a particularly important issue at the time.
- 3.54. However, given the Complainant's anxiety about confirming payment of the deposit, and the

contractual obligation under the ASP to make payment on 4 August 2017, the confirmation email concerned an important matter and is clearly an email which should have been placed on the file for the Property. The Committee considers that the failure to recognise the importance of, and to properly file or retain the confirmation email comprises a breach by Licensee 1 of Rule 5.1.

- 3.55. The Complainant also claims that the Licensees failed to inform her that the deposit was paid by Company C when it was paid (on 7 August 2017). She contends that the Licensees were required to tell her this given the significance of the information. Furthermore, the Complainant claims that had she known Company C was involved when the deposit was paid, she could have more easily cancelled the ASP and renegotiated a better agreement direct with Company C, and that the failure to disclose this information took away her options.
- 3.56. The Complainant refers to inconsistencies between Licensees 1, 2 and 3 about knowledge of the identity of the payee of the deposit. After several requests by the Complainant for information showing who paid the deposit, Licensee 1's email of 21 August 2017 disclosed that the deposit had been paid by Company C. At the time Licensee 1 also advised that that date was the first time he had become aware of the source of the deposit and Company C as the nominee purchaser. Licensee 2's statement (undated) states that neither he nor Licensee 1 was aware of Company C's involvement until the Complainant advised them that the deposit showed Company C as the payer. Licensee 3's letter of 23 August 2017 advised that it was not until the deposit was paid (7 August 2017) that the Agency realised that Company B & Company C were working together. However, Licensee 3's statement dated 19 December 2018, states that neither Licensees 1 and 2 nor the Agency were aware that Company B was acting on behalf of Company C prior to the Complainant raising her complaint and them reviewing the deposit entry.
- 3.57. Whilst, the information is difficult to reconcile, the Committee accepts that it is more likely than not that the Agency was aware that Company B and Company C were working together by 7 August 2017. However, the Committee is not satisfied that there was a requirement on the Licensees to advise the Complainant of the payer of the deposit. The payment was made after the ASP had become unconditional. Whilst the identity of the payer may have provided the Complainant with earlier knowledge about Company C's interest, as the ASP was already unconditional the ability to cancel or vary the contract, which allowed the purchaser to nominate another party, would have been no easier at that point than at a later point.
- 3.58. The Committee takes no further action in respect of this aspect of the complaint.

Purchaser A

- 3.59. The Complainant claims that Licensee 1 failed to advise of prospective purchaser Purchaser A's full name when this was known, and that Purchaser A was not really interested in purchasing but was encouraged to participate in the sales process to make Company B's offer look better. However, it is not possible to find that Purchaser A's identity or his interest was concealed or information given about him was misleading. Licensee 1 has explained that he did not know Purchaser A's surname until after the week 2 report. This is reflected in the week 1 and 2 reports. The weekly reports also record Purchaser A's ongoing interest and Purchaser A himself advised on 21 August 2017 that he had been a genuine tenderer. It is not possible to find that Purchaser A was used as claimed and the Committee takes no further action in respect of this aspect of the complaint.

Marketing credit and GST commission invoice

- 3.60. The Complainant has claimed that she did not receive the full marketing credit that Licensee 1

advised would be given to her, and that the credit was \$224.45 short. The Committee accepts the Agency's position that a marketing credit was deducted from the commission payable but finds that the commission deducted failed to account for the full amount of the marketing credit that Licensee 1 represented was to be paid upon a successful sale.

- 3.61. The Agency's agency agreement is dated 15 June 2017 and under clause 5.1 the Complainant authorised marketing expenditure "as per email dated 15 June 2017". Licensee 1's email of 15 June 2017 offers a 50% credit of the marketing cost and approximates the cost of marketing at \$3,134.00 plus GST. After finalising marketing costs, Licensee 1 advised the following day (16 June 2017) that the sum for newspaper advertising was lower as a package and in clarifying the cost he advised "upon successful sale of the property The Agency agree to refund \$2,378.90 plus GST" for marketing, making the Complainant's contribution \$1,567.00 plus GST.
- 3.62. As this sum was no longer approximate a credit for the full sum was payable to the Complainant. Despite this, the breakdown of the commission to be deducted by the Agency's solicitor, the Solicitor, on 2 October 2017 advised that a sum of \$2,154.45 plus GST had been deducted (resulting in a total commission of \$49,272.38). Despite information from the Complainant and her solicitors that this amount was incorrect, the Agency made no adjustment and invoiced the sum it claimed was payable on 8 December 2017. From the information provided the Committee is satisfied that, after allowing for a credit of \$2,378.90 plus GST as represented by Licensee 1, the commission payable was \$49,014.27. The Complainant should have received a further credit of \$258.12 (being \$224.45 plus GST). The Committee considers that upon it being brought to their attention, Licensees 1, 2 and 3 had an obligation to ensure that the amount credited was in accordance with the Agency's representations. The failure to do so is a breach of Rules 5.1 and 6.4.
- 3.63. The Complainant says that the Licensees did not raise the commission GST invoice until January 2018. As referred to above, the Agency invoiced for commission in December 2017. Due to the issues raised, the Complainant instructed that the deposit, which included the Agency's commission, be retained in the Agency's trust account. The Committee accepts that the Agency did not raise an invoice in respect of commission until it was agreed that the commission was able to be paid, and does not consider this amounts to a breach of the Licensees' obligations.
- 3.64. The Complainant also considers that the Licensees' commission was deducted despite her written advice that it not be and the Agency's agreement to that. However, this is not established on the evidence.
- 3.65. The Committee takes no further action in respect of this aspect of the complaint.

Licensee 3

Investigation of the Complainant's complaint to the Agency

- 3.66. As stated above, rule 6.2 requires a licensee to act in good faith and fairly with all parties and rule 9.3 requires that a client is kept well informed of matters relevant to the client's interest.
- 3.67. The Complainant claims that Licensee 3 failed to conduct a thorough and fair investigation into her complaint to the Agency and that he withheld requested documents.
- 3.68. Licensee 3 says that when the Complainant complained to the Agency he undertook a thorough and fair investigation into her complaint and in his view the documentation supported Licensee 1 and 2's position. However, the Committee finds that it is more likely than not that Licensee 3 failed to conduct a thorough or adequate investigation in relation to documentation concerning payment of the deposit. As already noted above, the 4 August 2017 confirmation

email was not on the transaction file when Licensee 3 gave it to the Complainant towards the end of August 2017.

- 3.69. In the context of the Complainant and her solicitor's emails and letters at the time, and the issue raised about the receipt of the deposit, the Committee is satisfied that an adequate investigation would have revealed that there was an email concerning payment of the deposit received late on 4 August 2017. As the Complainant had an interest in the email, the Committee is also satisfied that Licensee 3 should have ensured it was on the file and provided to the Complainant.
- 3.70. In addition, the Committee has found that Licensee 1's initial reason for withholding the email on grounds that it comprised information confidential to the purchaser was incorrect and should have been addressed by Licensee 3 as part of his investigation.
- 3.71. The Committee therefore finds that Licensee 3 failed to act fairly and in good faith and failed to keep the Complainant well informed of matters relevant to her interests in breach of rules 6.2 and 9.3.

Misleading information

- 3.72. The Complainant says that Licensee 3 provided misleading information about the receipt of Company B's confidentiality agreement. The Complainant also claims that Licensee 3 did not accept responsibility for the Licensees' failure to advise her that the deposit had been paid by Company C. Both of these matters are discussed or referred to above. Beyond the breaches or failings already found, the Committee is not satisfied that any further breaches have been established.
- 3.73. The Committee takes no further action in respect of this aspect of the complaint.

Section 124 statement of account

- 3.74. Section 124 requires that "as soon as an agent is asked by his or her client to do so, and in any case not later than 28 days after the agent receives any money in respect of the transaction, the agent must tender to the person lawfully entitled to the money an account in writing setting out particulars of all such money and its application."
- 3.75. The Complainant says that despite several requests the Agency did not provide the statement of account required under s 124 of the Act and the information provided by the Agency did not satisfy s 124. The Complainant contends that the s 124 information was deliberately withheld by Licensee 3 to conceal information that the Licensees didn't want the Complainant to see.
- 3.76. After becoming aware of the nomination exercised in favour of Company C, the Complainant made various requests to Licensee 1 for information concerning the identity and circumstances surrounding the payee of the deposit. This included a request for the Agency's bank statement with confidential information redacted, and the audit trail from the Trust receipt system showing when the transaction was generated. In his response on 21 August 2017, Licensee 1 advised that the Agency's bank statements were confidential and provided a screenshot of the Agency's internal accounting system. The screenshot provided records that the deposit was received on 7 August 2017 and credited to Company B's client ledger, not the Trust's.
- 3.77. Subsequently, in responding to the Complainant's complaint to the Agency, Licensee 3 provided the Complainant with a screen shot of the Agency's trust account ledger on 23 August 2017. This recorded that the deposit payment had been received from Company C on 7 August 2017. This information was considered to be insufficient and the Complainant's solicitors requested

information to satisfy the s 124 requirement on 15 September 2017. By letters dated 7 and 28 September 2017, the Agency's solicitors, advised that nothing more would be provided and the Trust account ledger provided was sufficient to satisfy s 124.

- 3.78. The Committee considers that the screen shot supplied by Licensee 3 does not provide an account in writing setting out the particulars of the deposit money and its application as required by s 124. Whilst the obligation under s 124 is on the Agency, Licensee 3 acted as a supervisor and manager on behalf of the Agency at relevant times and the request for information in that respect was directed to Licensee 3. The Committee finds that Licensee 3 failed to facilitate the Agency's obligations under s 124 in breach of rules 6.4 and 9.3.
- 3.79. In addition, the Committee notes that the sale was unconditional at the time the deposit was paid and accordingly, as the vendor, the Trust was the party legally entitled to the money. The Committee finds that the crediting of the deposit to Company B's client ledger instead of the Trust's amounts to a breach of Rules 6.1 and 6.2. However, the Agency is not a party to this complaint and as the Committee has already found that Licensee 1 failed to act in the Trust's best interests when providing information confirming payment of the deposit, the Committee exercises its discretion under s 80(2) of the Act and takes no further action in this respect.
- 3.80. The Complainant also requested, and considered that she should have been provided with a copy of the receipt issued by the Agency for the deposit. The Committee accepts that as this is a receipt due to the purchaser, there was no requirement to provide a copy to the vendor Trust.

Disclosure of information

- 3.81. The Complainant refers to various documents requested from the Agency on multiple occasions by herself and her solicitors, which she considers should have been in the control or possession of the Licensees and which have not been provided. The Complainant states that the issue concerning failure to provide the documents requested should be escalated to the Tribunal.
- 3.82. Under s 85 the Committee may by written notice require any person to produce any papers, documents, records or things, where it believes on reasonable grounds that this is necessary for the Committee to carry out its inquiry; the person has failed to comply with a previous request for the information; and the Committee believes on reasonable grounds that it is not reasonably practicable to obtain the information by another source, or it is necessary to obtain the information to verify or refute information obtained from another source.
- 3.83. Breach of a notice issued under s 85 could lead to the laying of a charge with the Tribunal.
- 3.84. In response to requests for information the Licensees have advised that there is no further information. In the circumstances the Committee is not satisfied that the criteria has been met to issue a notice under s 85 and it takes no further action in this respect.

4. Request for submissions on orders against Licensee 1, Licensee 2 and the Agency

- 4.1. The Complainant is to file submissions (if any) on what orders should be made within ten working days from the date of notice of this decision. These submissions, if any, will then be provided to the Licensees, with a timeframe for filing final submissions.
- 4.2. The Committee requires the Case Administrator to obtain a record of any previous disciplinary decision in respect of the Licensee and, if any such decision exists, provide it to the Committee.

5. What happens next

- 5.1. The Committee will conduct a separate hearing on the papers to consider all submissions and issue a decision on orders if any, under section 93 of the Act. Refer to the Appendix of this decision.

6. Your right to appeal

- 6.1. The Committee considers the 20 working day appeal period does not commence until it has finally determined this complaint by deciding what orders should be made, if any.

7. Publication

- 7.1. The Committee has deferred making any decision on publication until its hearing to decide what orders, if any, should be made.

Signed

A handwritten signature in black ink, appearing to be 'Rachel Palu', with a long horizontal line extending to the right.

Rachel Palu

Date: 9 July 2019

Appendix: Relevant provisions

The Real Estate Agents Act 2008 provides:

72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or
- (c) is incompetent or negligent; or
- (d) would reasonably be regarded by agents of good standing as being unacceptable.

89 Power of Committee to determine complaint or allegation

- (1) A Committee may make 1 or more of the determinations described in subsection (2) after both inquiring into a complaint or allegation and conducting a hearing with regard to that complaint or allegation.
- (2) The determinations that the Committee may make are as follows:
 - (a) a determination that the complaint or allegation be considered by the Disciplinary Tribunal;
 - (b) a determination that it has been proved, on the balance of probabilities, that the licensee has engaged in unsatisfactory conduct;
 - (c) a determination that the Committee take no further action with regard to the complaint or allegation or any issue involved in the complaint or allegation.
- (3) Nothing in this section limits the power of the Committee to make, at any time, a decision under section 80 with regard to a complaint.

93 Power of Committee to make orders

- (1) If a Committee makes a determination under Section 89(2)(b), the Committee may do 1 or more of the following:
 - (a) make an order censuring or reprimanding the licensee;
 - (b) order that all or some of the terms of an agreed settlement between the licensee and the complainant are to have effect, by consent, as all or part of a final determination of the complaint;
 - (c) order that the licensee apologise to the complainant;
 - (d) order that the licensee undergo training or education;
 - (e) order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint;
 - (f) order the licensee:
 - (i) to rectify, at his or her or its own expense, any error or omission; or
 - (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission;

- (g) order the licensee to pay to the Authority a fine not exceeding \$10,000 in the case of an individual or \$20,000 in the case of a company;
 - (h) order the licensee, or the agent for whom the person complained about works, to make his or her business available for inspection or take advice in relation to management from persons specified in the order;
 - (i) order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee.
- (2) An order under this section may be made on and subject to any terms and conditions that the Committee thinks fit.

111 Appeal to Tribunal against determination by Committee

- (1) A person affected by a determination of a Committee may appeal to the Disciplinary Tribunal against the determination within 20 working days after the day on which notice of the relevant decision was given under section 81 or 94, except that no appeal may be made against a determination under section 89(2)(a) that a complaint or an allegation be considered by the Disciplinary Tribunal.
- (1A) The Disciplinary Tribunal may accept a late appeal no later than 60 working days after the day on which notice was given to the appellant if it is satisfied that exceptional circumstances prevented the appeal from being made in time.
- (2) The appeal is by way of written notice to the Tribunal of the appellant's intention to appeal, accompanied by—
 - (a) a copy of the notice given to the person under section 81 or 94; and
 - (ab) the prescribed fee, if any; and
 - (b) any other information that the appellant wishes the Tribunal to consider in relation to the appeal.
- (3) The appeal is by way of rehearing.
- (4) After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.
- (5) If the Tribunal reverses or modifies a determination of the Committee, it may exercise any of the powers that the Committee could have exercised.

The relevant provisions from the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 are:

- Rule 5.1** A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
- Rule 6.1** A licensee must comply with fiduciary obligations to the licensee's client.
- Rule 6.2** A licensee must act in good faith and fairly with all parties engaged in a transaction.
- Rule 6.4** A licensee must not mislead a customer or client, nor provide false information, nor withhold information that by law or in fairness be provided to a customer or client.
- Rule 9.3** A licensee must communicate regularly and in a timely manner and keep the client well informed of matters relevant to the client's interest, unless otherwise instructed by the client.